

"Claimants will prepare an order in accordance with this memorandum opinion and in conformity with the rules of this Court, denying libelant's motion to reconsider.

"Libelant will prepare an order in accordance with this memorandum opinion and in conformity with the Rules of this Court, denying claimant's motion to remove."

On 7-12-61, the court rendered a supplemental memorandum opinion which indicated the court's willingness to certify for the purpose of an interlocutory appeal under section 1292(b) of Title 28, United States Code, that its ruling on the adulteration issue involved a controlling question of law as to which there was substantial ground for difference of opinion. However, on 12-8-61, in view of the strong policy against piecemeal appeals, and because the remaining issue of misbranding might be tried in several days, the court set its supplemental opinion aside and ordered that the case proceed to trial forthwith.

On 3-16-62, a consent decree of condemnation and destruction was filed, claimant moving that a decree, as prayed for in the libel with respect to the misbranding charges, be entered condemning the article under seizure, and the Government without waiving its right of appealing the court's order granting partial summary judgment, offering no objection. On 3-16-62, a partial summary judgment in favor of the claimant on the adulteration charge was also filed. On the same date the district court filed a stay of the order of destruction, thereby directing the U.S. marshal not to destroy the article under seizure until the Government had exhausted all appeal rights in this case. On 5-14-62, the Government appealed the court's partial summary judgment in favor of the claimant on the adulteration charge. On 1-14-63, the United States Court of Appeals for the 9th Circuit rendered the following opinion (313 F. 2d 219) :

PER CURIAM: "In this case the United States filed a libel against the above-mentioned Candy Bars alleging that the candy bars were (a) adulterated and (b) misbranded in violation of the Federal Food, Drug, and Cosmetic Act. Following proceedings in the court below, the court adjudged that the candy bars were not adulterated within the meaning of the applicable statute but adjudged that the same were misbranded and ordered them condemned and destroyed for this reason. United States has appealed from that portion of the judgment of the court below which found the candy bars not adulterated. No other appeal has been taken and the decree of condemnation ordering destruction of the candy bars because misbranded has become final. Appellee asserts that appellant's appeal is moot and should be dismissed.

"We are of the opinion that under the circumstances stated the matter determined against the United States is immaterial or moot, and that the motion to dismiss the Government's appeal should be granted.

"IT IS THEREFORE ORDERED AND ADJUDGED that the appeal of the United States be, and the same is hereby dismissed as moot. So much of the judgment below as dealt with the issue of adulteration is vacated and set aside, and the same is and shall be without further force and effect. *Duke Power Company v. Greenwood County*, 299 U.S. 259, 267, and cases cited in *United States v. Munsingwear*, 340 U.S. 36, 39, footnote 2. See also *Benz v. Compania Naviera Hidalgo S.A.*, 9 cir., 205 F. 2d 944, 947."

28994. Bio-C-Complex tablets. (F.D.C. No. 48328. S. No. 34-101 V.)

QUANTITY: 240 100-tablet btls., at Minneapolis, Minn.

SHIPPED: 5-16-61, from Worcester, Mass., by Brewer & Co., Inc.

LABEL IN PART: (Btl.) "Cayol \* \* \* Natural & Organic Bio-C-Complex Vitamin C . . . 100 mg. Rutin . . . 50 mg. Citrus Bioflavonoids . . . 60 mg. Distributed by Cayol Foods \* \* \* Minneapolis, Minn. \* \* \* Directions \* \* \* Indications—As A Dietary Supplement."

**LIBELED:** 10-22-62, Dist. Minn.

**CHARGE:** 403(j)—when shipped, the article was represented as a food for special dietary use by reason of presence therein of vitamin C and its label failed to bear, as required by regulations, a statement of the proportion of the minimum daily requirement for vitamin C supplied by such food when consumed in a specified quantity during a period of one day.

**DISPOSITION:** 11-14-62. Consent—claimed by Bessie Gold, t/a Cayol Foods, Minneapolis, Minn., and relabeled.

**28995. Hematinic tablets.** (F.D.C. No. 48382. S. No. 4-954 V.)

**QUANTITY:** 417 btls. at Baltimore, Md.

**SHIPPED:** 3-6-62, from Philadelphia, Pa., by Hance Bros. & White Co.

**LABEL IN PART:** (Btl.) "100 Sugar-Coated Green Continental Hematinic Tablets Recommended as a dietary supplement Each Tablet Contains: \* \* \* Folic Acid 0.3 mg. \* \* \* Sulfate \* \* \* 2035040 Continental Drug Co., Baltimore, Md. Distributors \* \* \* Dose: One to three tablets daily with meals."

**LIBELED:** 11-26-62, Dist. Md.

**CHARGE:** 402(a)(2)(C)—when shipped, the article contained a food additive, folic acid, which was unsafe within the meaning of 409 since it and its use or intended use were not in conformity with a regulation or exemption in effect pursuant to 409.

**DISPOSITION:** 12-26-62. Default—destruction.

**28996. Hemo-Glo tablets.** (F.D.C. No. 48057. S. No. 72-976 T.)

**QUANTITY:** 3 drums, containing a total of about 68,750 tablets, and 83 100-tablet btls., and 37 300-tablet btls., at Venetia, Pa., in possession of Nu-Age Biorganic Products, Inc.

**SHIPPED:** 5-29-62, from Inwood, Long Island, N.Y., by Barrows Chemical Co., Inc.

**LABEL IN PART:** (Btl.) "Hemo-Glo A rich natural dietary supplement indicated for iron deficiency anemia combining Iron, B-12, B-Complex, Vitamin C, Bioflavonoids, Liver, enzymes, and herbal extracts from natural sources. Manufactured for and distributed by Nu-Age Biorganic Products Venetia, Pennsylvania \* \* \* Dosage of Three Tablets Provide: \* \* \* Vitamin B-1 (Thiamine-yeast and rice bran concentrates) 3 mgs. \* \* \* Niacin (yeast conc.) 2 mgs. \* \* \* Vitamin C (rose hip conc.) 100 mgs."

**RESULTS OF INVESTIGATION:** Analysis showed that the article contained approximately 67% of the declared amount of vitamin B<sub>1</sub>, 50% of the declared amount of vitamin C, and 76% of the declared amount of niacin. Investigation showed that the articles in the bottles had been repacked by Nu-Age Biorganic Products, Inc., from bulk drums shipped as described above.

**LIBELED:** 8-20-62, W. Dist. Pa.

**CHARGE:** 402(b)(1)—while held for sale, valuable constituents, vitamin B<sub>1</sub>, vitamin C and niacin had been omitted or abstracted from the article.

403(a)—when shipped and while held for sale, the drum and bottle labels contained statements which represented and suggested that the article was of significant value for special dietary supplementation, and for the treatment of iron deficiency anemia, by reason of the presence therein of black cohosh, buchu leaves, comfrey root, strawberry leaves, mullein leaves, violet